WP(C) 4072/2007
BEFORE
HON'BLR MR JUSTICE AMITAVA ROY

JUDGEMENT AND ORDER(ORAL)

Comprehending that his preferential right to be promoted to the post of Chief Engineer, Water Resources Department, Government of Assam stands subverted by the Notification dated 3.8.2007(Annexure-G) thereby promoting the Respondent No.3 thereto, the petitioner seeks redress in this proceeding under Article 226 of the Constitution of India.

2. I have heard Mr N. Dutta, Senior Advocate ,assisted by Mr. I. Choudhury, Advocate for the petitioner, Mr P.Talukdar, learned Standing counsel, Water Resources Department ,Govt. of Assam and Mr AC Borbora, Senior Advocate ,assisted by Mr UK Nair, Advocate for the Respondent No.3.

3 The pleaded facts being indispensably essential, would have to be recited. The petitioner has contended that after being initially appointed as an Assistant Engineer in the Flood Control Department(as it then was in the year 1971) he was, in the year 1993 promoted as Executive Engineer and posted at Guwahati (West Environment Training Division) Planning and Development Department. In 2002 he was promoted to the rank of Superintending Engineer and in July,2006 to that of the Additional Chief Engineer and posted at NC Hills, Haflong. The Flood Control Department was renamed as Water Resources Department in the year 2002(hereafter also for short referred to as 'Department').He was thereafter transferred and posted as Addl. Chief Engineer, Lower Assam Zone (Water Resources),Guwahati. The petitioner has stated that the post of Chief Engineer, Quality Control, Flood Control in the Flood Control Department was upgraded to that of Addl. Chief Engineer in the scale of pay Rs.2825-5900/- vide Memo No.FC(E)/71/89/26 dated 11.12.1992. Subsequent thereto, the Secretary to the Govt.of Assam, Flood Control Department by Office Memo No.DC(E) 59/98/4 dated 26.5.1999 conveyed the sanction of the Governor of Assam for the upgradation of the post of Addl. Chief Engineer, Quality Control, Flood Control Department to that of Chief Engineer , Quality Control in the pay scale of Rs.10375-16050/-. Consequently, the office of the Chief Engineer, Quality Control, Flood Control Department became functional with effect from 12.7.1999.

This post of Chief Engineer, Quality Control, Flood Control Department ,however, was not envisaged in the Assam Engineering (Flood Control Department) Service Rules,1981 having been created later. The Rules do not provide either the mode of promotion therefrom to the higher post. According to the petitioner, the powers and duties of the post of Chief Engineer, Flood Control are different from that of the Chief Engineer, Quality Control, Flood Control Department, though both the posts carry the same pay scale of pay. According to him, the post of Chief Engineer, Flood Control is considered to be that of the Head of the Department ,whereas the Chief Engineer, Quality Control continues to function from the office of the Superintending Engineer.

On the creation of the Water Resources Department, these posts were re- designated as Chief Engineer, Quality Control, Water Resources Department and the Chief Engineer, Water Resources Department. Assam Engineering (Flood Control Department) Service Rules,1981 (herein after referred as the 'Rules') admittedly apply to the Water Resources Department. The petitioner has maintained that as a matter of procedure ,promotion is effected from the post of Addl. Chief Engineer to Chief Engineer, Quality Control and thereafter the promotee is raised as the Chief Engineer, Water Resources before being considered for further elevation to the next higher post. The petitioner has insisted that this practice has been consistently maintained since the year 1999. Several instances to the said effect have also been cited in the petition. It has been contended by him that the post of Chief Engineer, Water Resources has thus been treated to be a post superior to that of the Chief Engineer, Quality Control.

4. The petition discloses that on 29.3.2007 a meeting of the Selection Board for promotion of Addl.Chief Engineers of the Department to that of the C

hief Engineer was held and the following candidates were recommended in order of merit :

i) Shri Ziaul Islam
ii) Shri Ramesh Ch. Borah.. Petitioner
iii) Shri Uken Pegu &.ST(P).. Respondent No.3
iv) Shri Lohit Ch. Hazarika.

Following the approval of the recommendations under the Rules, the petitioner was thereafter promoted and appointed to officiate as Chief Engineer, Quality Control with Headquarters at Guwahati by Notification dated 30.6.2007. Incidentally, on the very same date, two vacancies had occurred due to the retirement of Ziaul Islam, Chief Engineer, Quality Control and the promotion of Sri KC Das, (Chief Engineer, Water Resources) as the Secretary of the Department. The petitioner resultantly was accommodated as Chief Engineer, Quality Control and Sri Paran Baruah was handed over the charge of the office of the Chief Engineer of the Department. Though the petitioner nursed an expectation that having regard to his position in the select list and earlier promotion as Chief Engineer, Quality Control, he would be elevated as the Chief Engineer, Water Resources as unusually done by the impugned Notification, the respondent No.3 was promoted and appointed as Chief Engineer, Water Resources Department with Headquarters at Guwahati. The petitioner being aggrieved though submitted a representation on 4.8.2007 before the Secretary of the Department, the same remained unattended.

The petitioner has maintained that since the creation of the post of Chief Engineer, Quality Control, it has been treated to be the feeder post for that of the Chief Engineer, Water Resources Department which stands substantiated by the professed norms of the Department as well as the continuously adhered executive decision of the Government of Assam maintained as the long term practice .The petitioner has questioned the impugned decision to be illegal, arbitrary and malafide to favour the Respondent No.3,on non germane considerations .

5. The official Respondents in their affidavit sworn by Sri Paran Baruah , Secretary to the Government of Assam, Water Resources Department while admitting the upgradation of the post of Additional Chief Engineer, Quality Control to that of Chief Engineer, Quality Control have affirmed that the pay scale thereof is equivalent to that of Chief Engineer of the Department. They admitted that the post of Chief Engineer, Quality Control was not incorporated in the Rules , but pleaded that the post of Chief Engineer, Water Resources was considered as Head of the Department till there was one post of Chief Engineer in the cadre. However, at the time of renaming of the Flood Control Department in the year 2002, both the posts of Chief Engineers were re-designated as Chief Engineer, Quality Control (sic) and carried the same scale of pay. The answering respondents stated that there was no executive order treating the post of Chief Engineer, Water Resources Department to be superior than that of Chief Engineer, Quality Control. According to them, the respondent No.3 belongs to ST(P) community and as till date no candidate of such category had held the post of Chief Engineer, he by the impugned Notification was promoted thereto.

The respondents reiterated that the post of Chief Engineer, Quality Control to which the petitioner had been promoted is of the same rank with equal pay and status. While denying the allegation that the impugned decision is to bestow undue favour on the respondent No.3, the respondents have reaffirmed that the posts are equivalent in the pay structure. Moreover, the post of Chief Engineer, Quality Control is directly under the administrative control of the Secretary, Water Resources Department and not of the Chief Engineer of the Department. It has been further stated that the petitioner being higher in order of preference in the select list, he was accordingly provided a posting as Chief Engineer, Quality Control that had fallen vacant prior in point of time and the respondent No.3 was thereafter accommodated against the post of Chief Engineer vacated due to the promotion of Sri Paran Baruah as the Secretary of the Department.

6. Endorsing the stand of the State respondents , the respondent No.3 in his counter has averred that though the post of Chief Engineer, Quality Cont

rol is not integrated in the Rules from the date of its creation, it has been considered to be equivalent to that of the Chief Engineer, Water Resources Department in pay, status and responsibility so much so, that the cadre strength of the said post is construed to be two for all purposes. The answering respondent has denied that the post of Chief Engineer has been designed as the Head of the Department and has avowed that both the Chief Engineers, Water Resources Department and the Chief Engineer, Quality Control have to directly report to the Secretary of the Department. He has denied that the post of Chief Engineer, Water Resources is a promotional one from that of the Chief Engineer, Quality Control and has clarified that the instances in the writ petition evidenced the postings to the post of Chief Engineer, Water Resources on transferred and not on promotion. He has also affirmed that no executive decision exists laying down the norms to be followed for the purpose of posting a person selected for the post of Chief Engineer either as Chief Engineer, Water Resources Department or Chief Engineer, Quality Control as no such requirement had ever been felt , both the posts being equivalent in all respects and included in the same cadre. The answering respondent has stated that a person appointed as Chief Engineer, Quality Control is by no means deprived of his promotional prospects to the next higher post of Secretary as is demonstrated by several instances in the past. No right of the petitioner has thus been infringed by his promotion against a vacant post. The respondent No.3 claimed to be functioning as Chief Engineer of the Department as on date.

7. In his reply affidavit, the petitioner while standing by the averments made in the writ petition insisted that all along the Seniormost Additional Chief Engineer from the respective select list used to be promoted as Chief Engineer, Quality Control at the first instance to be made the Chief Engineer subsequently. This being the consistent practice, in absence of any particular provision in the Rules relating to the Chief Engineer, Quality Control, it has attained the status of an executive policy not departable arbitrarily. The petitioner has asserted that the Chief Engineer, Water Resources makes the budget allocation for his office which is a clear index of superiority in the status of his office compared to that of Chief Engineer, Quality Control. The petitioner referred to an extract from the affidavit-in-opposition submitted by the State respondents in WP(C) No.2675/2006,Sri Anil Kumar Mitra vs. State of Assam and Ors to substantiate his stand.

8. Elaborating his stand on the plea of non equivalence of the two posts, the petitioner in his reply affidavit to the counter of the respondent No.3 has further stated that though the Chief Engineer of the Department is included in the Selection Board for the promotion under Rule 15 to the posts referred to therein, the Chief Engineer, Quality Control does not enjoy the said privilege. Moreover, the Chief Engineer, Quality Control is not a Member of the Technical Advisory Committee constituted by the Government for the Assam State Brahmaputra Valley Control Board, though the Chief Engineer, Water Resources Department is so. It is in recognition , according to the petitioner, of the higher status, responsibility and distinction attached to the post of Chief Engineer, Water Resources Department that the government had been continually treating the post of Chief Engineer, Quality Control as a feeder post therefor.

9. The respondent No.3 while responding to the above, in his additional affidavit has dismissed the averments of the government’s affidavit in WP(C) No.2675/2006 as not based on records besides being in a different factual context. According to him, the allocation of budget is only an administrative exercise conclusive of the superiority of the post of Chief Engineer, Water Resources over that of the Chief Engineer, Quality Control.

10. In the above background of the pleadings, Mr Dutta has persuasively urged that the post of Chief Engineer, Water Resources being higher in rank, and authority the promotion of the respondent No.3 thereto by overlooking the petitioner , superior to him on merit is per se illegal, arbitrary, discriminatory and unconstitutional. The learned Senior counsel argued that in view of the undisputed long standing practice that had metamorphed into a binding executive decision to post/appoint the Chief Engineer, Quality Control as Chief Engin

eer, Water Resources , the notification assailed makes an inexplicable departure therefrom and is liable to be adjudged arbitrary and lacking in bonafide. Refe rring to the pleadings of the parties bearing on this facet of the lis , Mr Dut ta has maintained that the post of Chief Engineer, Water Resources is the Hea d of the Department with additional and incidental status, power and responsibi lities elevating it to an echelon higher than that of the Chief Engineer, Qua lity Control and the petitioner ought to have been appointed thereto in prefer ence to the respondent No.3. The learned Senior counsel was assertively critica l on the fluctuating stands of the State respondents in this regard and dra wing the attention of this Court to their pleadings in WP(C) No.2675/2006 urge d for a remedial stringent action in law. He contended that it being apparent fr om the counter filed in the aforementioned writ petition that the post of Chief Engineer, Water Resources Department was evidently higher in rank and status tha n that of the Chief Engineer, Quality Control, they were estopped in law from a dopting an incongruous disposition which in the contextual facts ought to be co nstrued as contumacious.

Mr Dutta submitted that it is inconceivable that the Water Resources Department is without a Head of the Department as is sought to be suggested by the State respondents being wholly repugnant to the fundamental concept of the organizat ional set up as envisaged by the Fundamental Rules and the Financial Rules gov erning the affairs thereof. The learned Senior counsel jettisoned the plea of preference of the respondent No.3 as a ST(P) candidate contending that had it been so, he, would had been promoted at the first instance as the Chief Engine er, Quality Control over the petitioner. He branded this claim to be an afterth ought. Though the two posts are in the same cadre having regard to the duties, functions and the responsibilities attached thereto, the post of Chief Engine er, Water Resources was higher in status and therefore posting thereto from tha t of Chief Engineer, Quality Control ought to be construed as promotion which ha d been unfairly denied to the petitioner, he urged. The decision of the Apex Cou rt in State if Rajasthan, Appellant v. Fateh Chand Soni, Respondent (1996) 1 SC C 562 was pressed into the aid of the arguments advanced.

11. Mr Talukdar while abiding by the pleaded averments of the State res pondents has submitted that the impugned order in the existing conspectus of facts is unassailable in law. The learned State counsel has produced the relevan t official records.

12. Mr Borbora, insisting on the equivalence of the two posts has emph atically urged that the essential characteristics thereof being strikingly id entical, all contentions to the contrary are fallacious and rejectable in limine . According to him, pay and emoluments, promotional prospects to higher posts , parity of the cadre and applicability of the Rules being analogous in both the posts a marginal difference in the nature of duties and the functions relata ble thereto cannot be a determinative criteria proclaiming higher status, auth ority and prerogative of the Chief Engineer, Water Resources. Mr Borbora dismi ssed the relevance of the practice observed by the Department in posting a Chi ef Engineer, Quality Control as Chief Engineer, Water Resources to confer any r ight to the petitioner and contended that as these were the feeder posts for t hat of the Secretary of the Department, the impugned notification did not in any way undermine the petitioner’s prospects for further promotion. There being neither any statutory provision nor any executive instruction of binding effec t vesting the petitioner with an unassailable right to claim posting as Chief E ngineer, Water Resources in preference to the respondent No.3, the cavil is mis conceived, he urged. The stand taken by the official respondents in WP(C) No.2 675/2006 is inconsistent with the basic premise recorded in the selection proce eding treating both these posts in the same cadre and is therefore , unworthy of any credit. The learned Senior counsel argued that at no point of time , any distinction was maintained between the two posts and for the promotion to the post of Chief Engineer, the cadre thereof is accepted to be of two and dependin g on the vacancy available the promottee is accommodated therein. That the Chief Engineer, Water Resources and the Chief Engineer, Quality Control both repor t directly to the Secretary of the Department clearly demonstrates amongst other

s the equivalence of the two posts ,he urged.

13. I have lent my thoughtful consideration to the contesting pleadings and the arguments advanced. The prefatory facts culminating in the promotion of the parties are not in dispute. On the date of the petitioner's promotion two vacancies had occurred , one each in the post of Chief Engineer, Quality Control and Chief Engineer, Water Resources Department. Resultantly, the petitioner was promoted as Chief Engineer, Quality Control on that date and one Sri Paran Baruah was accorded the charge of the office of the Chief Engineer, Water Resources . Inspite of the vacancies as above, the respondent No.3 as a reserved category candidate was not preferred over the petitioner for such promotion. He was promoted later on 3.8.2007 as Chief Engineer, Water Resources which, according to the perception of the petitioner was by-passing him. Had the respondent authorities inclined to accept the respondent No.3's preferential claim for promotion , in recognition of his reserved category status, he would have been favoured for the benefit at the first instance on 30.6.2007. It therefore does not commend for acceptance that the promotion of the respondent No.3 to the post of Chief Engineer, Water Resources was because of his reserved category identification . The official records produced , on perusal as well, do not demonstrate that the respondent No.3 had been promoted as Chief Engineer, Water Resources being a ST(P) candidate.

14. Noticeably, the respondents have not denied the transition of a Chief Engineer, Quality Control as Chief Engineer, Water Resources as evidenced by Annexure-D series before being considered for promotion to the post of Secretary of the Department. They seek to trivialize this advancement as posting and not promotion. The following excerpt from the affidavit-in-opposition of the State respondents in WP(C) No.2675/2006 , Shri AK Mitra vs. The State of Assam and Ors, is significantly demonstrative of their stand on this facet of the debate.

10. &.. Here it can be added that although the post of Chief Engineer, Quality Control and Chief Engineer,Water Resource are equivalent posts, yet there some are differences as the Chief Engineer, Water Resource is the Head of Department and the Appellate Authority for the staff under him which the Chief Engineer, Quality Control is not. The Department therefore has followed the practice to give proper justice to the prospective Addl. C.E.'s for promotion serially as Chief Engineer, Quality Control first and then to transfer him to the post of Chief Engineer, Water Resource, after gaining experience in the post of Chief Engineer, Quality Control.

The above affirmation in the affidavit by the Deputy Secretary to the Govt. of Assam, Water Resource Department , unambiguously proclaims the superiority of the post of Chief Engineer, Water Resource over that of the Chief Engineer, Quality Control. Not only the Chief Engineer, Water Resources is thereby construed to be the Head of the Department , the posting of the promotee Addl. Chief Engineer as the Chief Engineer, Quality Control as deductible is to equip him with necessary experience to place him thereafter as the Chief Engineer, Water Resources. This statement on behalf of the State is in marked alignment with the subsisting arrangement of postings of the Chief Engineer, Quality Control as Chief Engineer, Water Resources before his promotion to the next higher grade of the Secretary of the Department on his turn.

A departure , however, has been sought for to be charted by the state Respondents in their affidavit in the instant proceeding, where they have laboured to drill the plea, that though the post of Chief Engineer, Water Resources before the creation of the post of Chief Engineer, Quality Control was considered to be the Head of the Department , on the availability of two posts in that grade, both have been treated to be at par with the same pay and status and are construed to be the feeder posts for promotion to the net higher rank.

The affirmation in both the affidavits (one in the present proceeding is by the Secretary to the Govt.of Assam, Water Resources Department) are true to the knowledge of the respective deponents. It is therefore obvious that one of them have misrepresented the facts before this Court which un-compromisingly w

arrants a stringent action against the erring officer. The pleadings before a Court of law ought to essentially depict the correct and undisputed facts so as to facilitate an appropriate adjudication based thereon and the law applicable. Any attempt to suppress or misrepresent facts would tantamount to interference with the administration of justice and deflecting its course. Not only thereby the rule of law would be undermined , it would be an affront to the dignity and majesty of a court of law eroding its credibility in the estimation of the society. The two conflicting stands as noticed hereinabove ,unerringly project a casual indifference and irresponsible approach of the concerned authorities of the Water Resources Department and is not only contemptuous ,but also deplorable. As the first step, this Court therefore directs the Chief Secretary of the State to take note of the above anomalies and cause a discrete enquiry to be made at his level as to the underlying reason therefor and submit a report to this Court within two(2) months herefrom. Depending on the report and disclosures contained therein ,further appropriate steps would be taken. I leave this issue at this in praesenti

15. The above, notwithstanding, the recorded view of the State Respondents in WP(C) no.2675/2006 cannot be disregarded, more particularly when it accords with the accepted practice of posting out a Chief Engineer, Quality Control to be the Chief Engineer, Water Resources Department before his elevation to the next higher grade.

16. There is no dissension at the Bar that the Assam Engineering (Flood Control Department) Service Rules,1981 as amended applies to the Water Resource Department. Rule 3 thereof includes the Chief Engineer in the Class I (Senior Grade) of the service. Promotion thereto is from the post of Addl. Chief Engineer on the basis of merit with due regard to seniority.

The sanctioned strength displayed in Schedule-I to the Rules refers to one temporary post of Chief Engineer which too is kept in abeyance. Visibly, Schedule-I to the Rules have not been updated. Admittedly at present there are two posts of Chief Engineers as noticed hereinabove.

Undisputably, the Chief Engineer, Water Resources is a Member of the Boards for promotions from the Subordinate Engineer to that of Superintending Engineer and the intermediate posts as disclosed in Rule 15(as amended). The Chief Engineer, Water Resources Department is also a Member of Assam State Brahmaputra Valley Flood Control Board, Guwahati as is substantiated by the minutes of the meeting of the said Committee (Annexure-K to the affidavit in reply of the petitioner to that of the counter of the respondent No.3). The Chief Engineer, Water Resources Department designs the budget allocations for the department as is evidenced by Annexure-I to the affidavit in reply of the petitioner to the counter of the State respondents. The Office memorandum carrying the allotments is inter alia addressed to the Chief Engineer, Quality Control indicating the nature of expenditure approved.

17. The pleaded statements bearing on the above and the supporting documents have remained unrefuted. The respondents have not asserted that the posts of Chief Engineer, Water Resources and the Chief Engineer, Quality Control are inter changeable for the above official acts. There is no candid disclosure in the State affidavit identifying the Head of the department. Parity of pay notwithstanding, absence of a Head of the Department in a government establishment is conceptionally in comprehensible . As it is, pay is not always the decisive index of equivalence of posts, and other determinants namely, nature of duties and responsibilities attached thereto and the predominance, authority and jurisdiction are essential adjuncts thereof.

18. The Apex Court in Rooplal and another vs. Lt. General through the Chief Secretary, Delhi and Ors held that while determining equalization of posts many factors other than pay would have to be taken into consideration e.g. the nature of duties, responsibilities, minimum qualification etc. It re-counted its pronouncement in Union of India vs. P.K., Roy, AIR 1968 SC 850 wherein four such categories had been identified namely, (1) nature of duties of post(2) responsibilities and powers exercised by the officer holding a post, the extent of territorial and other charge held or responsibilities discharged (3) the minimum

qualification if any, prescribed for recruitment to the post and(4) the salary of the post, it observed that the salary of a post for the purpose of ascertaining the equivalence of posts, they are the last of the criterias . It does not emphasis that the equivalence of two posts was not judgeable by sole fact of equal pay.

19. The respondents have by no means , claimed similitude in the two posts on all these counts. Inclusion in the same cadre to be the feeder posts for promotion to the next higher rank cannot be per se suggestive of equivalence of two posts.

For a disciplined and orderly working of any organization , a well designed functional contour and administratively acknowledged jurisdictions must imperatively exist. The absence of a Head of the department or office is extinctive of the concept of institutional hierarchy and besides being irreconcilable with the scheme of the Fundamental Rules and the Financial Rules would inevitably occasion chaos , imprecision, arbitrariness and want of transparency in the administrative governance. Superiority of a post in the same cadre vis a vis its counterpart carrying the same scale of pay , if necessary has to be ascertained by the parameters of status, jurisdiction , distinction ,preeminence and authority attached thereto and the nature of the duties and the responsibilities dischargeable by the incumbent thereof.

If a long standing practice in a department on the basis of the above criteria is redolent of the said distinction, absence of any notification or any executive decision would not be of detractive bearing . As a matter of fact, Rules in the form as it exists on date does not refer to the post of the Chief Engineer, Quality Control. The official records which script the process of the promotion of the parties mentions the office of the Chief Engineer as Head of the department.

On a totality of the above considerations, I am of the considered opinion that the post of Chief Engineer, Water Resources enjoys ascendancy in distinction, power and status in office compared to that of the Chief Engineer, Quality Control in day to day administration of the affairs of the said department .

20. The Apex Court in the State of Rajasthan(Supra) relied upon by Mr Dutta while dwelling on the purport of the expression promotion held with reference to its meaning provided in the Webster’s Comprehensive Dictionary that- not only it connotes the advancement to a higher post or rank, but also implies advancement to a higher grade. The expression was elucidated to mean ,advancement or preferment in honour, dignity, rank or grade.

Promotion as interpreted thus , does not necessarily denote elevation to a higher post and may signify shift to a level of higher grade or honour or distinction . In the conspectus of facts as unfolded hereinabove, I am of the unhesitant opinion that the posting of a Chief Engineer, Quality Control as Chief Engineer, Water Resources imports promotion in the wider sense as comprehended in the above reported decision. The petitioner having been promoted to the post of Chief Engineer, Quality Control was therefore entitled in view of the departmental practice in vogue to be posted as Chief Engineer, Water Resources in preference to the respondent No.3. The reasons cited for the departure are neither logical nor reasonable or legally sustainable.

21. In the result, the impugned order dated 3.8.2007 promoting the respondent No.3 to the post of Chief Engineer, Water Resources Department is hereby set aside. Consequently, the respondents are hereby directed to post the petitioner to the post of Chief Engineer, Water Resources Department forthwith. The Registry would forward a copy of this judgment and order to the Chief Secretary of the State so as to enable him to take the necessary steps as directed hereinabove. The petition stands allowed. No costs.